No. 16,230

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LO BUE BROTHERS, a Partnership; MARIO LO BUE, FRED LO BUE, and JOSEPH LO BUE, Partners; and WILLIAM LUTHER WOODALL, DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of California, Northern Division

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

We shall not attempt in this reply brief to repeat or restate the arguments set forth in our main brief. A few paragraphs will suffice to focus the issues and to mark out some of the irrelevant and erroneous arguments in the brief filed by the defendants, *i.e.*, the appellees.

I. The Cases Relied On By The Appellees, In Their Brief, Relative To The Meaning Of The Word "Willfully" Do Not Support The Appellees' Argument, And Their Reliance On Those Cases Is Misplaced.

The appellees cite in their brief, pp. 13-18, eight cases with respect to the meaning of the word "will-

fully" in § 8a(5) of the Act. A brief analysis of the eight cases is sufficient to show that the appellees' reliance on those cases is misplaced.

The first case which is relied on by the appellees, in their brief, pp. 15-16, is *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 239, and the appellees characterize it as "[p]erhaps the leading case in point, and certainly the one most frequently quoted and relied upon in later decisions of the Circuit Courts of Appeals * * *." We agree that it has been quoted and relied on in subsequent cases, but the appellees failed, in their brief, to explain that it is cited and relied on in *United States* v. *Gris*, 247 F. 2d 860, 864 (C. A. 2), and *Trenton Chemical Co.* v. *United States*, 201 F. 2d 776, 777-780 (C. A. 6), certiorari denied, 345 U. S. 994, which as shown in our main brief, pp. 52-53, 56-57, are squarely in point, in the case at bar, in support of our interpretation of the term "willfully" in § 8a(5) of the Act.

The Court, in holding the defendants liable as "willful" violators in *United States* v. *Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, said that in "statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication" (*id.* at 242). The subsequent decision in *United States* v. *Gris*, *supra*, 247 F. 2d 860, 864 (C. A. 2), in which the defendant was convicted of "willfully and knowingly" violating the Federal Communications Act, is based on *United States* v. *Illinois Cent. R. Co.*, *supra*. The Court

held in the *Gris* case (247 F. 2d at 864) that: "It matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was in violation of the Federal Communications Act. He intended to do what he did, and that is sufficient. *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 239, 58 S. Ct. 573, 82 L. Ed. 773." The decision in the *Gris* case is of course diametrically contrary to the appellees' argument in their brief, p. 18, that they are not willful violators if they did not intend or "believe" that the excess shipments would subject them to liability under § 8a(5) of the Act.

The case of *United States* v. *Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, is also cited in *Trenton Chemical Co.* v. *United States*, *supra*, 201 F. 2d 776, 779-780, in which the defendant was held liable for having "willfully" exceeded a quota restriction. The defendant contended in the *Trenton Chemical Company* case, *supra*, that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F. 2d at 778-779). In affirming the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong" evidence of "bad faith or evil purpose on the part of the defendant was not necessary to con-

stitute a violation of the act but it was sufficient if the prohibited act was intentional or voluntary" (201 F. 2d at 780).

The appellees direct attention in their brief, p. 15, to the fact that in our main brief we did not cite *United States* v. *Illinois Cent. R. Co.*, *supra*, 303 U. S. 239. To be sure, we did not cite the case, but we specifically relied in our main brief, pp. 52-53 and 56-57, on *Trenton Chemical Co.* v. *United States*, *supra*, 201 F. 2d 776, 777-780 (C. A. 6), certiorari denied, 345 U. S. 994, and *United States* v. *Gris*, *supra*, 247 F. 2d 860, 864 (C. A. 2), which, as we have shown, apply the doctrine of the *Illinois Central Railroad Company* case, *supra*, and it is sufficient to say that the *Illinois Central Railroad Company* case is in accord with our interpretation of the word "willfully" in § 8a(5) of the Act.

The second and third cases relied on by the appellees in their brief, p. 16, are *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69 (C. A. 8) and *Oregon-Washington R. & Nav. Co.* v. *United States*, 205 Fed. 337 (C. A. 9). These cases, however, are discussed in *United States* v. *Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, 242-243, which, as we have shown, is in accord with our interpretation of the statutory term "willfully." Hence the appellees' reliance on *St. Louis & S. F. R. Co.* v. *United States*, *supra*, and *Oregon-Washington R. & Nav. Co.* v. *United States*, *supra*, is misplaced.

The fourth and fifth cases relied on by the appellees in their brief, p. 16, relative to the term "willfully," are *Zimberg* v. *United States*, 142 F. 2d 132 (C. A. 1), certiorari denied, 323 U. S. 712, and

Kempe v. *United States*, 151 F. 2d 680 (C. A. 8). The *Zimberg* case is a criminal proceeding (142 F. 2d at 133) and the *Kempe* case is also a criminal proceeding (151 F. 2d at 680), whereas the case at bar is a civil action. In affirming the defendants' conviction in the *Zimberg* case on charges of having "willfully" violated the statute, the Court of Appeals referred to *United States* v. *Illinois Cent. R. Co.*, *supra*, 303 U. S. 239, 242, in holding that the word "willfully" as used in the Emergency Price Control Act means knowingly and intentionally but not malevolently. 142 F. 2d at 137-138. The *Kempe* case cites and follows the holding in the *Zimberg* case. 151 F. 2d at 688.[1] Both of these cases are cited in *Trenton Chemical Co.* v. *United States*, *supra*, 201 F. 2d at 780, and the holding in the *Trenton Chemical Company* case is apposite in the case at bar. Plainly the *Zimberg* case and the *Kempe* case are in accord with the argument in our main brief, pp. 50-58, with respect to the meaning of the word "willfully."

The sixth case relied on by the appellees in their brief, p. 16, is *Riss & Co.* v. *United States*, 262 F. 2d 245 (C. A. 8), in which elaborate precautions against a violation of the statute there involved did not preclude liability on a charge of "willfully" violating the statute. The case is cited in our main brief, pp. 54-55, and as explained there it supports our interpretation of the word "willfully."

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[1] The criminal conviction in the *Kempe* case was reversed because incompetent evidence, prejudicial to the defendants, was admitted in the case, tried before a jury, in the District Court. 151 F. 2d at 690.

The seventh case relied on by the appellees in their brief, p. 16, is *Nabob Oil Co.* v. *United States*, 190 F. 2d 478 (C. A. 10). That case was a criminal proceeding, and in affirming the defendant's conviction under an indictment of 17 counts, charging willful violations of the Fair Labor Standards Act, the Court of Appeals held that in "some penal statutes the word willful means that the offense must be committed malevolently, with a bad purpose or an evil mind. These offenses ordinarily involve moral turpitude but in those statutes denouncing acts not in themselves wrong, such an evil purpose or criminal intent need not exist" (190 F. 2d at 480). That interpretation with respect to a violation—such as in the case at bar—which does not involve turpitude is consonant with the argument in our main brief, pp. 51-52.

The eighth case relied on by the appellees in their brief, p. 16, is *Nicastro* v. *United States*, 206 F. 2d 89 (C. A. 10), involving statutory language which is different from the statutory terms in the case at bar. In the *Nicastro* case, *supra*, in order to reduce the amount of liability the burden was on the defendant—by the express terms of the Act—to prove that the violation was neither willful nor the result of the failure to take practicable precautions against the occurrence of the violation. 206 F. 2d at 90, fn. 1. The reference in the Court's opinion (*id.* at 92) to the failure to seek legal advice relates to whether the defendant took practicable precaution against the occurrence of the violation, and not as to whether the offense was willful (*ibid.*). In affirming

the judgment of the District Court that the defendants were liable for statutory penalties, the Court of Appeals said that the word "willfully" does not mean with an evil purpose or criminal intent (*ibid.*).

The cases relied on by the appellees in their brief give no support to their argument with respect to the meaning of the word "willfully" in § 8a(5) of the Act, and the cases insofar as relevant here support our interpretation of the word "willfully" in § 8a(5). Also the appellees failed to deny, in their brief, that the meaning of the word "willfully" is often influenced by its context. In this case, the various provisions of the Act and the carefully expressed design of Congress are explained in our main brief, pp. 33-50, and under these statutory provisions the erroneous advice given to the appellees with respect to the meaning of the statutory provisions is no defense in an action, as here, for liability under § 8a(5) of the Act.[2]

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[2] Various contentions and allegations in the appellees' brief are manifestly without merit. *E.g.*, the appellees argue in their brief, pp. 21-22, that suit could have been brought against the appellees for liability under § 8a(5) relative to some additional shipments of navel oranges in excess of the allotments or quotas. Obviously, that does not change the statutory provisions or preclude liability for the excess shipments which are involved in this case. See, *e.g.*, *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 113-114; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 674-685; *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U. S. 325, 330-331; *Amshoff* v. *United States*, 228 F. 2d 261, 265-266 (C. A. 7), certiorari denied, 351 U. S. 939.

II. The Legislative History Relied On By the Appellees, In Their Brief, Does Not Relate to § 8a(5) of the Act and Therefore Does Not Support the Appellees' Argument.

The appellees contend in their brief, pp. 23-28, that the proviso in § 8c(14) of the Act—exempting a handler, for a certain period of time, from liability "under this subsection" for a fine of $50 to $500 if a petition pursuant to § 8c(15)(A) of the Act "was filed and prosecuted by the defendant [handler] in good faith and not for delay"— is applicable also to § 8a(5), and the appellees rely, in support of their argument, on certain parts of the legislative history of the Act of August 24, 1935 (49 Stat. 750, 759-760).[3]

The appellees quote in their brief, pp. 23-24, three sentences from Sen. Rep. No. 1011, 74th Cong., 1st sess., p. 14, but the appellees failed, in their brief, to state that the Senate Report is discussing, in this respect, only the relationship between § 8c(14) and § 8c(15). No reference is made in the Senate Report to § 8a(5) or the liability, as here, for triple forfeiture pursuant to § 8a(5). The statutory amendments made effective by the Act of August 24, 1935, did not involve § 8a(5) which, as shown in our

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[3] The fourth issue of law to be tried, according to the Stipulation of Facts and Issues in the District Court is "[w]hether the immunity provided by the proviso in 7 U. S. C. 608c(14) applies to this suit" (R. 31). See also the fifth and sixth issues of law which relate to factors involved in the fourth issue of law (R. 31). The District Court, in its memorandum opinion, stated that the appellees relied on the proviso in § 8c(14) of the Act (R. 64-65).

main brief, pp. 38-40, was already in effect. Hence the legislative history of the Act of August 24, 1935, relied on by the appellees, does not support, in any respect, the appellees' argument that the proviso in § 8c(14) is also applicable to § 8a(5). Moreover, as shown in our main brief, pp. 34-35, the proviso in § 8c(14) is limited, by its terms, to a fine of $50 to $500 imposed "under this subsection" and it could not, therefore, be applicable to a different subsection, *viz.*, subsection (5), under a different section, *viz.*, § 8a.

III. The Appellees' Allegations, In Their Brief, That The Regulatory Program Is Not Being Administered Properly Are Without Foundation, And The Appellees' Assertions Are Wholly Aside From The Issues Formulated In The Trial In The District Court.

No record reference is given by the appellees with respect to the various allegations in their brief, pp. 29-36, that the program is not being administered properly by the United States Department of Agriculture. No issue in that respect was formulated by the complaint (R. 3-11) and the answer (R. 11-19) or in the course of the trial in the District Court (R. 19-198).[4] All of the appellees' allegations which tend to discredit the Department or tend to deprive it of good repute, with respect to the Department's administration of the program involved in this case,

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[4] "One of the things that ought to be certain is that parties do not find themselves trying a new and different case on each successive higher branch of the appellate tree." *Union Pacific R. R. Co.* v. *Johnson,* 249 F. 2d 674, 677 (C. A. 9).

are patently unwarranted and wholly without foundation.

The short answer to the appellees' allegations is that if the program is not being administered in accordance with law an avenue is available to the appellees under § 8c(15) of the Act (7 U. S. C. 1958 ed. § 608c(15)) to resolve any such issue, on the basis of an adjudicatory hearing, and full judicial review is available under § 8c(15)(B). That is the exclusive procedure to which a handler is confined for a determination with respect to the validity of the regulatory program or an obligation imposed on the handler pursuant to the program. *United States* v. *Ruzicka*, 329 U. S. 287, 292-294; *Panno* v. *United States*, 203 F. 2d 504, 508-509 (C. A. 9); *LaVerne Co-op. Citrus Ass'n* v. *United States*, 143 F. 2d 415, 418 (C. A. 9); *United States* v. *Ideal Farms, Inc.*, 262 F. 2d 334, 334-335 (C. A. 3). The appellees are familiar with that method of determining the legality of administrative action under this statute. The stipulation of facts in this case shows (R. 25-28) that the appellees filed a complaint or petition under § 8c(15)(A) of the Act with respect to the validity of the allotment or quota limitations in this case. The appellees' brief, pp. 3-4, summarizes the allegations in their complaint or petition pursuant to § 8c(15)(A) of the Act, but the appellees failed in their brief to explain that the findings of fact and the decision were adverse to the appellees. It was held by the Judicial Officer in dismissing the appellees' petition, on the basis of the evidence, that the contested allotment or quota limitations were

"reasonable" (R. 343), that the quotas "reflected the particular conditions prevailing in the area" (R. 343), and that the "restrictions imposed were instrumental in attaining excellent returns to growers for the 1955-1956 crop" (R. 343), and that there was "no evidence of discrimination against petitioner [*i.e.*, Lo Bue Brothers, appellees in this case] in the record" (R. 345). "In fact, petitioner [*i.e.*, Lo Bue Brothers] marketed almost five percent more of its 1955-1956 crop in fresh fruit channels than the average marketed by handlers and producers from Southern California," in that marketing season, and also marketed a higher percentage of its navel oranges "in fresh market channels than the average marketed by handlers in Central California" (R. 345). "[A]ny price differential between Southern and Central California navel oranges appears to have resulted from the characteristics of the two crops rather than the time of the marketing of the respective crops." (R. 345-346). Although as shown in our main brief, pp. 60-61, the proceeding was not moot as a matter of law, no appeal was taken from the administrative decision (R. 28).[5]

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[5] It is alleged in the appellees' brief, p. 20, that at the time of the decision of the Judicial Officer, relative to their petition under § 8c(15)(A) of the Act, the "Navel Orange Administrative Committee was not proposing to repeat its unprecedented action of restricting the shipment of Central California navel oranges beyond their historical marketing period," and that, accordingly, the appellees decided not to appeal from the decision of the Judicial Officer. There is no foundation in the record for that allegation. But in any event, the committee does not establish or prescribe the allotments or quotas. It merely submits recommendations to

It is axiomatic that the Court cannot take the allegations in the appellees' brief as evidence of facts not appearing in the record. *Hussman* v. *Durham*, 165 U. S. 144, 150. It was said in *Schley* v. *Pullman Car Company*, 120 U. S. 575, 578, that the brevity of the record and the assertions that the additional facts alleged in the brief on appeal are "incontrovertible" cannot "palliate" the attempt to "influence the decision here, by reference to matters not in the record, and which, he [*i.e.*, the writer of the brief] must have known, could not be taken into consideration."

Although allowance should be made for intensity of zeal and earnestness on the part of counsel, nevertheless we are constrained to suggest that the unwarranted allegations in the appellees' brief, bearing reproachfully on the Department's administration of the program, are manifestly improper. The argument *ad hominem* in the appellees' brief is similar, in effect, to that in *Cox* v. *Wood*, 247 U. S. 3, 6-7, in which it was said that if the improper argument should subsequently come under observation it "would but serve to indicate to what intemperance of statement an absence of self restraint or forgetfulness of decorum would lead, and would therefore admonish of the duty to be sedulous to obey and respect" the well-known rules. See also, *Green* v. *Elbert*, 137 U. S. 615, 624; *Royal Arcanum* v. *Green*, 237 U. S.

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the Secretary of Agriculture (7 CFR § 914.51), and the Secretary makes the decision, on the basis of the recommendation "or other available information," relative to the establishment of allotments or quotas (7 CFR § 914.52).

531, 546-547; *Anderson* v. *Federal Cartridge Corp.*, 156 F. 2d 681, 686 (C. A. 8).

CONCLUSION

For the foregoing reasons, in addition to those in our main brief, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

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